

67878-7

67878-7

NO. 67878-7-I

COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON

THE CITY OF BELLINGHAM,
a Washington municipal corporation, and
MARK QUENNEVILLE,
an individual,

Appellants,

vs.

LIND BROS. CONSTRUCTION, L.L.C.,
a Washington limited liability company,

Respondent.

REPLY BRIEF OF APPELLANT CITY OF BELLINGHAM

James Erb, WSBA No. 40128
Assistant City Attorney
City of Bellingham
210 Lottie Street
Bellingham, WA 98225
Telephone (360) 778-8270
Fax (360) 778-8271

FILED
COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON
2012 JUL -6 AM 11:56

TABLE OF CONTENTS

1 ARGUMENT..... 1

A. INTRODUCTION 1

B. RESPONSE TO LIND'S STATEMENT OF THE ISSUES 1

C. STANDARD OF REVIEW FOR CONCLUSIONS OF LAW. 2

 1. *Whether the Hearing Examiner's interpretation of RCW 43.21C.240 in Conclusions of Law 16, 17, and 20 was erroneous?... 3*

 2. *Whether the Hearing Examiner's interpretation of BMC 16.50 in Conclusions of Law 13, 14, and 22 was clearly erroneous? 7*

 3. *Whether the Hearing Examiner's interpretation of BMC 18.10.020 in Conclusion of Law 21 was clearly erroneous?..... 14*

D. STANDARD OF REVIEW FOR CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE..... 16

 1. *Finding of Fact 43 17*

 2. *Finding of Fact 59 19*

 3. *Finding of Fact 63 20*

 4. *Findings of Fact 64, 65, 66..... 21*

 5. *Finding of Fact 68 22*

2 CONCLUSION 25

TABLE OF AUTHORITIES

Cases

<i>City of Federal Way v. Town and Country Real Estate, LLC</i> , 161 Wn. App. 17, 37, 252 P.3d 382 (2011).....	2
<i>City of Medina v. T-Mobile USA, Inc.</i> , 123 Wn.App. 19, 29, 95 P.3d. 377 (2004).....	14, 19
<i>Friends of Cedar Park Neighborhood v. City of Seattle</i> , 156 Wn.App. 633, 641, 234 P.3d 214 (2010).....	17, 19, 22
<i>Holder v. City of Vancouver</i> , 136 Wn.App. 104, 107, 147 P.3d 641 (2006).....	11
<i>In re King County Hearing Examiner</i> , 135 Wn.App. 312, 144 P.3d 345 (2006).....	5
<i>Palmer v. Jensen</i> , 81 Wn.App. 148, 153, 913 P.2d 413 (1996).....	11
<i>Washington Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County</i> , 77 Wash.2d 94, 98, 459 P.2d 633 (1969).....	11

Statutes

RCW 36.70C.130(1)(c).....	16
RCW 43.21C.240.....	2, 4, 7
RCW 43.21C.240(2)(a).....	4, 5
RCW 43.21C.240(4).....	6

Municipal Code

BMC 16.50.030(A)(3) 9

BMC 16.50.050..... 9

BMC 16.50.060..... 8, 9, 10, 11

BMC 16.50.080(B) 9

BMC 18.10.020..... 2, 16

BMC 18.10.020(B)(4)..... 15

BMC 21.10.010..... 15

BMC 21.10.100(D)..... 15

Rule of Appellate Procedure

RAP 2.5..... 23

1 ARGUMENT

A. Introduction

Lind has failed to establish a basis for reversing the decision of the Hearing Examiner. As the City has shown, the Hearing Examiner's decision is based on a correct interpretation of the applicable law and is supported by substantial evidence in the record. The City respectfully requests that the court reverse the erroneous decision of the superior court and affirm the decision of the Hearing Examiner.

B. Response to Lind's Statement of the Issues

The City processed Lind's application as vested to the Wetland Stream Ordinance (*former* BMC 16.50).¹ This is not a vesting case. Therefore, the City does not respond to Issues 3A and 3B.

Issue 3C - "Whether the City improperly used SEPA to impose conditions on the project when existing development regulations already addressed any potential adverse environmental impacts?" is more accurately stated as follows: Whether the Hearing Examiner's

¹ Lind submitted its application on December 5, 2005, the day before the Wetland and Stream Regulatory Chapter (BMC 16.50) was repealed and replaced by the Critical Areas Ordinance (BMC 16.55). The City treated the project as vested to BMC 16.50.

interpretation of RCW 43.21C.240 in Conclusions of Law 16, 17 and 20 was erroneous?

Issue 3E - "Whether the conditions of MDNS and the Wetland-Stream Permit were substantively proper?" is more accurately stated as follows: Whether the Hearing Examiner's interpretation of BMC 16.50 in Conclusions of Law 13, 14, and 22 was clearly erroneous?

Issue 3F - "Whether the city illegally conditioned the LLA approval on the conditions of the Wetland-Stream Permit?" is more accurately stated as follows: Whether the Hearing Examiner's interpretation of BMC 18.10.020 in Conclusion of Law 21 was clearly erroneous?

C. Standard of Review for Conclusions of Law.

Lind assigns error to Conclusions of Law 13-14, 16, 17, 20-22. Lind Brief, p. 3. Challenges to conclusions of law are legal questions that this court reviews de novo, but only "after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." *City of Federal Way v. Town and Country Real Estate, LLC.*, 161 Wn.App. 17, 37, 252 P.3d 382 (2011), citing RCW 36.70C.130(1)(b).

The Hearing Examiner's conclusions of law are entitled to deference on appeal. *Id.* The Hearing Examiner correctly interpreted the

law and correctly applied the law to the facts. Lind's arguments to the contrary are based on a misreading of the law, misstatements of fact, or both.

1. Whether the Hearing Examiner's interpretation of RCW 43.21C.240 in Conclusions of Law 16, 17, and 20 was erroneous?

Conclusion of Law 17 states:

The MDNS conditions contested by Lind Bros. are all based on requirements of the BMC or other applicable regulations and they are also conditions imposed in the wetland/stream permit itself... These MDNS conditions do not attempt to impose new requirements that are not already imposed by development regulations and they do not violate the purpose and intent of RCW 43.21C.240... *[RCW 43.21C.240] only prohibits imposition of additional mitigation under SEPA if the city determines that the requirements for analysis, protection, and mitigation under the development regulations is adequate.* The City did not impose additional mitigation under SEPA, it merely repeated the requirements of applicable development regulations. COL 17, CP 2053 (emphasis added).

Lind assigns error to this conclusion and argues that the Hearing Examiner "avoided the issue." Lind Brief, p. 24-33. Lind's argument is based on a misreading of the statute.

RCW 43.21C.240 states:

(1) If the requirements of subsection (2) of this section are satisfied, a city reviewing a project action shall determine that the requirements for environmental analysis, protection, and mitigation measures in the city's development regulations and comprehensive

plans...provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply...In these situations, in which all adverse environmental impacts will be mitigated below the level of significance as a result of mitigation measures included by changing, clarifying, or conditioning of the proposed action and/or regulatory requirements of development regulations adopted under chapter 36.70A RCW or other local, state, or federal laws, a determination of nonsignificance or a mitigated determination of nonsignificance is the proper threshold determination.

(2) A city shall make the determination provided for in subsection (1) of this section if:

(a) In the course of project review, including any required environmental analysis, ***the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts are adequately addressed by the development regulations*** or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws; and

(b) The local government bases or conditions its approval on compliance with these requirements or mitigation measures. RCW 43.21C.240 (emphasis added).

The statute does not apply because the City did not make the determination in RCW 43.21C.240(2)(a) that the specific impacts of Lind's proposal were adequately addressed by the existing development regulations.

RCW 43.21C.240 is a shield, not a sword. The statute allows a jurisdiction to opt-out of additional environmental review if the jurisdiction determines that a project's specific impacts are adequately

addressed by existing development regulations. *In re King County Hearing Examiner*, 135 Wn.App. 312, 144 P.3d 345 (2006).

Snohomish County relied on RCW 43.21C.240 to "opt-out" of additional environmental review in *In re King County Hearing Examiner. Id.*, at 326. Snohomish County engaged in an exhaustive environmental review process beset by multiple administrative appeals of environmental impacts statements by a citizen's group opposed to the proposed action, *i.e.* a wastewater treatment facility. *Id.*, at 314.

Snohomish County determined that outstanding environmental issues were "adequately addressed by Snohomish County's development regulations and by the existing final EIS and supplemental EIS." *Id.*, at 325. That determination was explicitly stated in a development agreement between the county and the applicant. The court of appeals held that the Snohomish County could "opt-out" of further environmental review. *Id.*, at 327. When the citizen's group filed another administrative appeal, Snohomish County relied on RCW 43.21C.240 as a shield against another challenge to the sufficiency of its SEPA review.

Lind is attempting to use RCW 43.21C.240 as a sword to challenge the City's issuance of a MDNS. An obvious flaw in this argument is that the City did not make the determination called for in RCW 43.21C.240(2)(a). Lind argues that the City does not need to make a

project-specific determination because it already adopted the WSO to address impacts to wetlands. Lind Brief, p. 27 (quoting RCW 43.21C.240(4)). Assuming *arguendo* that Lind's interpretation of RCW 43.21C.240(4) is correct and the statute applies, there was no violation.

The proper threshold determination for a proposal when the specific adverse impacts of the proposed action are adequately mitigated by existing development regulations and the jurisdiction conditions its approval on compliance with those regulations is a DNS or a MDNS. RCW 43.21C.240(1). This is exactly what the City did here. The City issued a MDNS with mitigating conditions based on the existing development regulations related to wetlands, *i.e.* BMC 16.50. CP 969-71. This is illustrated by the table below²:

Condition in MDNS:	Condition in WSP:	This condition is based on the following BMC provision(s):
Condition 1	Condition 3	BMC 16.50.080(b)
Condition 2	Condition 4	BMC 16.50.080(d)
Condition 3	Condition 5	BMC 16.50.030(a)(2)
Condition 4	Condition 6	BMC 16.50.080(a)
Condition 5	Condition 7	BMC 16.50.100
Condition 6	Condition 8	BMC 16.50.100
Condition 7	n/a	BMC 16.50.090(a)
Condition 8	Condition 17	BMC 16.20.190, BMC 16.20.200, and BMC 13.04.070(b)

² The table is based on the testimony of Kim Weil, the City's wetland specialist who processed Lind's wetland/stream permit application, who explained the basis for each condition imposed in the MDNS at the administrative hearing. CP 132-140. There was no competing testimony or evidence.

Condition 9	Condition 18	BMC 15.08.080 and BMC 15.12.070
Condition 10	Condition 1	BMC 16.50.050(a)(2) and BMC 16.50.080(b)

The eight mitigating conditions related to wetlands in the MDNS are based on BMC 16.50 (the WSO). The other two mitigating conditions, Conditions 8 and 9, were based on other existing development regulations. The City did not rely on best available science, the newly adopted Critical Areas Ordinance (BMC 16.55), or any other ad-hoc development regulations to address wetland issues as Lind suggests. Lind Brief, p. 29.

The Hearing Examiner did strike MDNS conditions 8 and 9 and the identical conditions in the wetland/stream permit because they were adequately covered by Condition 12 in the wetland/stream permit. COL 18, CP 2054. The Hearing Examiner did not agree with Lind that imposing these conditions violated RCW 43.21C.240. Lind Brief, p. 25.

Lind has failed to establish that the Hearing Examiner erroneously interpreted RCW 43.21C.240 or that she clearly and erroneously applied the statute to the facts in Conclusions of Law 16, 17, and 20.

2. Whether the Hearing Examiner's interpretation of BMC 16.50 in Conclusions of Law 13, 14, and 22 was clearly erroneous?

Conclusion of Law 13 states:

Lind Bros. contends that the City has no authority to require a new delineation to determine if the wetland is a mature forested wetland. It claims that it is vested to the delineation performed in 2005 because that delineation was accepted by the City. **However, BMC 16.50.060 provides that the Director determines what additional information is necessary with respect to delineation and categorization.** The Director's approval did not occur until issuance of the permit and that issuance was conditioned upon provision of additional information to determine the appropriate category for the wetland. Lind Bros. argument would render public comment futile. Notice of the application was required both by the WSO and SEPA. The public had a right to learn of the proposal and provide comment on it. Some of those comments provided information that at least some characteristics of a mature forested wetland existed on or near the site. The department was also aware that nearby property had been reclassified as a mature forested wetland. The Director determined that additional information was necessary to properly classify the wetland. COL 13, CP 2051-52 (emphasis added).

Lind argues that the City did not use the procedure in BMC 16.50 to challenge the wetland categorization from 2005. Lind Brief, p. 31-33.

Lind's argument is based on a misreading of the BMC 16.50.060.

BMC 16.50.060 states:

Collection of information necessary for the determination of wetland boundaries (delineation) and category will ultimately be the responsibility of the property owner... **The Director shall determine when a permit application is required and what additional information may be necessary.** BMC 16.50.060 (emphasis added).

The applicant collects the information and the Director uses that information to determine the wetland boundary and category. *Id.* The

Director has the authority to determine "what additional information may be necessary" determine a wetland category. *Id.*

The Director determined that additional information was necessary to properly categorize the wetland based on public comments received about the proposal. CP 998-1027, CP 1559-60. The comments suggested that the wetland on-site meets the criteria for mature forested wetlands - Category I wetlands under BMC 16.50.050. *Id.* The public comments contradict the categorization of the wetland in the 2005 NES report submitted by Lind. CP 1029-74.

Lind suggests that the City should have "[looked] into the situation itself" or conducted an "on-site investigation into the credibility of the [public] comments" before requesting a mature tree study. Lind Brief., p. 44. But the collection of information needed to determine a wetland boundary and category is the responsibility of the applicant. BMC 16.50.060. And the Director has the authority to determine "***what additional information may be necessary***" for the determination of a wetland category. *Id.*

Properly categorizing the wetlands on site is a necessary first step in avoiding further net losses of regulated wetland and stream functions. BMC 16.50.030(A)(3), CP 924. The WSO includes a minimum buffer requirement for each category of wetlands. BMC 16.50.080(B), CP 929.

Category I wetlands , the most valuable type, require a 100 foot minimum buffer. *Id.* Category II wetlands require a 50 foot minimum buffer. *Id.* If the wetland on Lind's property is underrated (as alleged in public comments), then a 50-foot minimum buffer will not provide adequate protection for the wetland. Therefore, the Director requested additional field analysis. CP 963.

Lind argues that the City "did not engage in the process under BMC 16.50.060 to "challenge" or otherwise change the [wetland delineation from the NES report]." Lind Brief, p. 32. Lind misreads the ordinance. BMC 16.50.060 states:

A determination of the *wetland boundary* provided by the applicant shall be subject to the approval of the Director who may require adjustments to the *boundary delineation*.³ In the event the adjusted *boundary delineation* is contested by the applicant, the Director and the applicant shall jointly select a wetland specialist who will delineate the disputed *boundary* as the final determination at the property owner's expense. BMC 16.50.060 (emphasis added).

This procedure is used for resolving disputes over the applicant's determination of the *wetland boundary*. There is no reference in this procedure to disputes over the determination of the *wetland category*.

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of

³ Delineation is defined in the WSO as follows: The precise determination of wetland *boundaries* in the field and the mapping thereof. BMC 16.50.040 (emphasis added).

things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* - specific inclusions exclude implication. ***Washington Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County***, 77 Wash.2d 94, 98, 459 P.2d 633 (1969).

Lind has failed to establish that the Hearing Examiner's interpretation of the BMC 16.50.060 in Conclusion of Law 13 was clearly erroneous.

Conclusion of Law 14 states:

Determination of the proper category for the wetlands on the site is required prior to issuance of the wetland/stream permit under BMC 16.50.100. The permit should not have been issued prior to making that determination. It is clear from the inclusion of Condition No. 1 of the wetland/stream permit that the Director did not have the information that he deemed necessary prior to issuance of the permit. The permit should be remanded to the Director for a determination of the wetland category, pursuant to BMC 16.50. COL14, CP 2052 (emphasis added).

Lind's Brief does not address this issue, therefore it has been abandoned.

Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. ***Palmer v. Jensen***, 81 Wn.App. 148, 153, 913 P.2d 413 (1996). A party abandons an issue on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument. ***Holder v. City of Vancouver***, 136 Wn.App. 104, 107, 147 P.3d 641 (2006). Lind's Brief contains no argument on this issue, therefore, it is abandoned.

Even if this issue was not abandoned, Lind's argument would fail on the merits. The WSO states in pertinent part:

After review of all pertinent information, the Director shall determine if the proposal is in conformance with the intent and regulations of this chapter and if it is in the public interest to issue a wetland permit. BMC 16.50.100(D)(emphasis added).

The Director must review all pertinent information before issuing a permit.

The Director required to Lind to provide additional field analysis as a condition of approving the wetland/stream permit. CP 982. The field analysis, *i.e.* the mature tree study, is pertinent because the Director determined that it was needed to determine the wetland category and, consequently, the minimum required buffer. CP 139-48.

As explained above, each wetland category has a required minimum buffer for mitigation of adverse impacts. The MDNS required a 50-foot minimum buffer based on the categorization submitted by Lind in 2005. CP 969. The MDNS also required Lind to demonstrate that a 50-foot buffer was sufficient, *i.e.* to demonstrate that the wetland was not a mature forested wetland. CP 970. The Hearing Examiner concluded that this was backward. COL 14, CP 2052. The wetland category must be determined before a wetland/stream permit is issued. *Id.* The Hearing Examiner therefore remanded the wetland/stream permit to allow the

Director to determine the wetland category before issuing a decision on the application. COL 14, CP 2052.

Lind has failed to prove that the Hearing Examiner's interpretation of BMC 16.50.100 in Conclusion of Law 14 was clearly erroneous.

Conclusion of Law 22 states in part:

Lind objects to the City providing notice of the application and receiving public comment in 2009. Notice of the applications is required for both SEPA and the wetland/stream permit...Although the applications were filed in December 2005, much of the information needed to process and review the applications was not provided by the applicant to the City until 2008 and 2009. COL 22, CP 2055.

Lind does not dispute that public notice was required or that the City provided public notice. Instead, Lind argues that the City was required to provide public notice in January 2006 pursuant to BMC 16.50.100(D). Lind Brief, p. 31. The Hearing Examiner correctly concluded that Lind was responsible for the delay in providing notice.

Lind submitted its applications on December 6, 2005. The City repeatedly requested additional information, including information about the wetlands on site, for the next three years. CP 123, CP 948-49. Lind did not provide that information, including a completed SEPA checklist, until December 2008. CP 1140. The information provided by Lind in December 2008 exceeded the exempt threshold for SEPA. FOF 13, CP

2033-34. Lind did not challenge this finding. An unchallenged finding of fact is a verity on appeal. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 29, 95 P.3d. 377 (2004). The City therefore required a SEPA mailing list and fee. CP 954-55. Lind provided those items in May 2009. CP 1697. The City provided public notice two weeks later. CP 957. The City issued the SEPA threshold decision on June 27, 2009. CP 959-61.

The Hearing Examiner properly rejected Lind's argument that the City was required to provide public notice *before* Lind submitted all of the information required to process its applications. COL 22, CP 2055. Lind has failed to show that Conclusion of Law 22 was clearly erroneous.

3. Whether the Hearing Examiner's interpretation of BMC 18.10.020 in Conclusion of Law 21 was clearly erroneous?

Conclusion of Law 21:

Lind Bros. challenges Condition No. 1 of the Lot Line Adjustment approval because it incorporates the conditions of the wetland/stream permit. It also contests the Director's Finding of Fact No. 8 and Conclusion of Law No. 7. The finding and conclusion provide that satisfying the conditions associated with the wetland/stream permit will yield three building envelopes within the adjusted lots that are not located within a regulated wetland buffer and that compliance with BMC 18.10.020B(4) has been demonstrated through the issuance of the wetland/stream permit and approval of the lot line adjustment is conditioned to ensure that all conditions of the wetland/stream permit are met prior to final approval. The Director determined that the avoidance of wetlands and buffers as required in the wetland/stream permit provides the overall improvement of function and utility of the

lots. Given the odd configuration of the proposed lots it is unlikely that they would be found to improve the function and utility of the lots unless the configuration was chosen to avoid environmental impacts. Without the wetland/stream permit scenario the proposed lots would be less functional than those that are existing due to the odd shapes. Lind Bros. has not shown that the Director erred by making the lot line adjustment conditional on compliance with the wetland/stream permit. The specific conditions of the wetland/stream permit have been addressed above. COL 21, CP 2054-55.

Lind challenges this conclusion and argues that BMC 18.10.020 provides no basis for conditioning approval of the lot line adjustment when the criteria are met. Lind Brief, p. 45-46. Lind's argument is based on a selective reading of the ordinance and a misstatement of the facts

Lind's selective reference to "BMC Chapter 18.10" ignores the following provision: "Lot line adjustment applications shall follow the procedures in BMC 21.10." BMC 18.10.020(A). BMC 21.10 establishes the standard procedures for land use and development permit decisions made by the City. BMC 21.10.010. The Director may approve an application, ***approve an application with conditions***, or deny an application. BMC 21.10.100(D)(emphasis added). Clearly, the Director may approve a lot line adjustment with conditions.

BMC 18.10.020(B)(4) states: "The [City] shall give preliminary approval to the applicant...if it finds that the lot line adjustment improves the overall function and utility of the lots." Lind's argument suggests that

all four requirements were met without any conditions. Lind Brief, p. 46.

This argument ignores the facts.

The Director found that complying with the conditions in the related wetland/stream permit would yield three building envelopes within the adjusted lots that are not located in a regulated wetland or buffer. CP 973. Creating three buildable lots would improve the overall function and utility of the lots as required by BMC 18.10.020(B)(4). *Id.* The converse is also true - Lind cannot demonstrate an improvement to "the overall function and utility of the lots" without showing the building envelopes in the new lots outside of the wetland buffers. Therefore, the Director included a condition on Lind's lot line adjustment requiring Lind to demonstrate compliance with the conditions in the related wetland/stream permit. CP 974.

Lind has failed to establish that the Hearing Examiner's interpretation of BMC 18.10.020 was clearly erroneous.

D. Standard of Review for challenges to the sufficiency of the evidence.

When reviewing a challenge to the sufficiency of the evidence under RCW 36.70C.130(1)(c), the court considers whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Friends of Cedar Park Neighborhood*

v. City of Seattle, 156 Wn.App. 633, 641, 234 P.3d 214 (2010)(quotation marks and citations omitted). The court views "all the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority..." *Friends of Cedar Park*, 156 Wn. App. at 641 (quoting *Peste v. Mason County*, 133 Wn.App. 456, 477, 136 P.3d 140 (2006)). The court also defers to the hearing examiner's assessment of the "credibility of witnesses and the weight to be given reasonable but competing inferences." *Friends of Cedar Park*, 156 Wn.App. at 641 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn.App. 614, 618, 829 P.2d 217 (1992)).

There is a sufficient quantity of evidence to persuade a fair minded person that each challenged finding of fact is true or correct. Because the City prevailed before the Hearing Examiner, the court should view all of the evidence and the reasonable inferences in the light most favorable to the City. The court should also defer to the Hearing Examiner's assessment of the credibility of witnesses and the weight to be given reasonable but competing inferences.

1. Finding of Fact 43

Finding of Fact 43 reads as follows: "Neither of the wetland delineation and mitigation studies engaged in the field investigation necessary to determine the potential existence of a mature forested wetland on the subject site and adjoining wetland areas." FOF 43, CP 2040. There is substantial evidence to support this finding.

Vikki Jackson did not testify at the administrative hearing. Therefore, the only evidence of her analysis was her report. CP 1029-74. The report does not state that Ms. Jackson performed the field analysis required to determine whether the wetlands met the criteria for mature forested wetlands. CP 1029-74. The report does not indicate the wetland type on the wetland rating field data form in the report. CP 1055.

Kim Weil, the City's wetlands specialist who processed Lind's application, testified as follows: "The mature forested wetland issue was simply not raised or addressed by either wetland biologist at this time in either 2005 or 2008." CP 148.

Lind argued below that Vikki Jackson's report was evidence that Wetland A does not the criteria of a mature forested wetland. The City argued that the report is evidence that the necessary field analysis was not performed. These were reasonable, but competing inferences based on the evidence in the record, *i.e.* Vikki Jackson's 2005 NES report. CP 1029-74. The Hearing Examiner resolved this factual dispute in favor of the City.

The court defers to the hearing examiner's determination of the weight to be given reasonable, but competing inferences. *Friends of Cedar Park*, 156 Wn.App. at 641.

The foregoing evidence, by itself, is substantial and provides adequate support for the Examiner's finding. The mere existence of competing evidence does not demonstrate a lack of substantial evidence to support the finding.

The Hearing Examiner also made the following finding of fact:

Katrina Jackson, author of the 2008 report, did not perform a new delineation of [Wetland A]...She did not perform a field investigation to determine whether the wetland was a mature forested wetland for the 2008 report and plan. FOF 61, CP 2045.

Lind did not challenge this finding. An unchallenged finding of fact is considered a verity on appeal. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 29, 95 P.3d. 377 (2004).

Lind also cites a third evaluation by Kyle Legare in December 2008. Lind Brief, p. 34. Mr. Legare did not perform any field analysis in December 2008; he simply reviewed the report submitted by Vikki Jackson. CP 1269-70.

Finding of Fact 43 is supported by substantial evidence.

2. Finding of Fact 59

The Wetland Rating Field Data Form - Western Washington attached to the 2005 delineation report in **Lind Bros. Exhibit 7** shows no indication of wetland type. None of the boxes for wetland type, estuarine, natural heritage wetland, bog, mature forested, old growth forest, coastal lagoon, interdunal, or none of the above, are checked in this data form. Wetland A is rated with maximum points for habitat function in nearly all five categories. FOF 59, CP 2045.

The form is in the record and the Hearing Examiner's description of the form is accurate. CP 1055. Lind concedes that "the finding is correct in that that [sic] the box under "wetland type" is not checked." Lind Brief, p. 35.

Finding of Fact 59 is supported by substantial evidence.

3. Finding of Fact 63

Quenneville owns and resides on the property immediately east/southeast of the subject property. He submitted several comments to the City regarding the subject proposal. His comments raised questions regarding the proper classification and delineation of the wetlands on site. He conducted an informal survey of trees on or near the subject property and counted/measured about 18 trees that were at least 21-inches in diameter at breast height. He is not a wetlands specialist but he is professionally familiar with hydrographic surveying methods and is a software engineer. FOF 63, CP 2045

This finding was supported by both exhibits in the record (CP 997-1027) and the testimony of Mark Quenneville. CP 303-378.

Lind challenges this finding for failing to state that Mr. Quenneville entered Lind's property without permission. Lind Brief, p. 36. The Hearing Examiner overruled Lind's objection on this basis below because there was no evidence that any trespass was involved. CP 805-806.

Lind also challenges this finding as "misleading" because Quenneville is a layperson, not a wetland specialist. Lind Brief, p. 36. The Hearing Examiner explicitly stated: "*Quenneville is not a wetlands specialist* but he is professionally familiar with hydrographic surveying methods and is a software engineer." FOF 63, CP 1128 (emphasis added).

Lind completely ignores the substance of the finding, *i.e.* Quenneville submitted comments regarding Lind's proposal raising questions about the classification of the wetlands on site and the required minimum buffers. FOF 63, CP 2045. Lind's comments are in the record. CP 997-1027.

Finding of fact 63 is supported by substantial evidence.

4. Findings of Fact 64, 65, 66

Dr. John McLaughlin, Nick Sky, and Dr. Sarah Cooke all testified before the Hearing Examiner. The Hearing Examiner summarized their testimony in Findings of Fact 64-66. CP 2046. Lind's challenges to these

findings are simply challenges to the credibility determinations made by the Hearing Examiner. The court on review defers to the hearing examiner's assessment of the "credibility of witnesses and the weight to be given reasonable but competing inferences." *Friends of Cedar Park*, 156 Wn.App. at 641. Therefore, these challenges should be denied.

It is worth noting that Nick Sky sent an email to the City during the public comment period that states: Vikki Jackson's report contains "errors and omissions" and "severely underrates this high quality forested wetland." CP 1559-60. Mr. Sky questioned the accuracy of the categorization provided by Lind in December 2005 and requested that the City obtain more information about the wetland so that a "more informed decision" can be made. *Id.*

Findings of Fact 64, 65, and 66 are supported by substantial evidence.

5. Finding of Fact 68

Kim Weil is a City planner with a B.S. in freshwater ecology. She participated in creating the citywide wetland inventory, was on a Department of Ecology team that developed the latest guidelines for wetlands and she coauthored the CAO. She determined during her review of the wetland/stream permit application that a 100-foot buffer was appropriate to protect the wetland functions. She stated that the habitat function requires the largest buffer and that the rating for habitat function for this site is the highest she has seen. She stated that Wetlands C and D on the site are Category III

wetlands that are under the size threshold for City regulation. She indicated that the wetland classification for the Fairhaven Highlands property, which is located to the west of Hoag's Pond, and not far away from the subject property, was changed to Category I because of the presence of a mature forested wetland. She also indicated that she didn't think that the determination regarding Fairhaven Highlands affected the analysis of the subject site, except that the characterization of the area did inform the City and that the area and connectivity were taken into account. Ms. Weil states that a 100-foot buffer is more protective of the high habitat function of the wetland than a 50-foot buffer. She stated that she respected the Director's decision to reduce the buffer to an averaged 50-foot buffer but she was still of the opinion that a 100-foot buffer was warranted. FOF 68, CP 2046-47.

Lind challenged this finding because it mentions the Fairhaven Highlands project "that has no factual or legal bearing on the instant project" and it "purports to give credence to Ms. Weil's personal opinion regarding buffer widths in direct contradiction to the Director's decision." Lind Brief, p. 40.

Ms. Weil's testimony included at least twelve references to Fairhaven Highlands. CP 117-285. Lind did not object to the relevance of this testimony and even cross-examined Ms. Weil about the City's experience on Fairhaven Highlands. CP 196, CP 203-204. The court may refuse to review any claim of error that was not raised below. RAP 2.5. In any event, the testimony was relevant because the Director considered the City's experience on the nearby Fairhaven Highlands property when he requested additional information about Lind's property. CP 167-68.

Fairhaven Highlands is located near Lind's property. The main wetland on Lind's property extends off-site towards the Fairhaven Highlands. CP 142. There is connectivity between the wetlands on Lind's property and the wetlands on Fairhaven Highlands. CP 140-42. Vikki Jackson, the same wetland biologist who categorized Wetland A for Lind, analyzed the wetlands on Fairhaven Highlands. Ms. Jackson conducted a subsequent field analysis at the City's request in 2009 and determined that some of the wetlands on Fairhaven Highlands met the criteria of a mature forested wetland. CP 1575-77. Ms. Jackson re-categorized those wetlands from Category II to Category I. *Id.* The memorandum summarizing Ms. Jackson's subsequent analysis and conclusions was provided to the City in August 2009. CP 142-43. This was the same time that the City was receiving public comments were received on Lind's proposal. CP 999-1027.

The record shows that Ms. Weil did recommend a 100-foot buffer for Wetland A in June 2006 based the description of Wetland A (including the habitat score) in Vikki Jackson's 2005 NES report. CP 123-124, CP 948-49. While substantial evidence supports this finding, the Hearing Examiner did not determine the required minimum buffer because that issue was not before her. Therefore, this fact is surplusage.

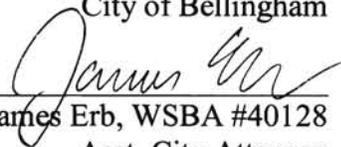
Finding of Fact 68 is supported by substantial evidence.

2 CONCLUSION

Lind has failed to meet its burden. Lind has failed to establish that the Hearing Examiner's decision was based on a clearly erroneous interpretation of the law. Lind has failed to establish that the Hearing Examiner's findings of fact are unsupported by substantial evidence. Lind has also failed to show that the Hearing Examiner clearly and erroneously applied the law to the facts.

Therefore, the City respectfully requests that the Court reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner.

Respectfully submitted this 5th day of July, 2012.

City of Bellingham

James Erb, WSBA #40128
Asst. City Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION ONE**

**CITY OF BELLINGHAM, a
Washington municipal corporation and
MARK QUENNEVILLE, an individual,**

No. 67878-7

Appellants,

CERTIFICATE OF SERVICE

vs.

**LIND BROS. CONSTRUCTION, LLC.,
a Washington limited liability company,**

Respondents.

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUL -6 AM 11:56

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On July 5, 2012, I served a true and correct copy of the following documents to be delivered as set forth below:

- 1. Reply Brief of Appellant City of Bellingham; and**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. **Certificate of Service.**

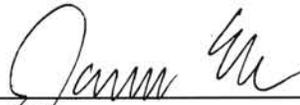
On the 5th day of July 2012, I addressed said documents and deposited them for delivery as follows:

Dave Bricklin	<input checked="" type="checkbox"/>	By United States Mail
Bricklin & Newman, LLP	<input type="checkbox"/>	By Facsimile
1001 Fourth Avenue, Suite 3303	<input checked="" type="checkbox"/>	By E-mail
Seattle, WA 98154	<input type="checkbox"/>	Hand Delivery
bricklin@bnd-law.com		

Peter Dworkin	<input checked="" type="checkbox"/>	By United States Mail
Belcher Swanson Law Firm, PLLC	<input type="checkbox"/>	By Facsimile
900 Dupont Street	<input checked="" type="checkbox"/>	By E-mail
Bellingham, WA 98225	<input type="checkbox"/>	Hand Delivery
prd@belcherswanson.com		

DATED this 5th day of February, 2012.

CITY OF BELLINGHAM



 James Erb